BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

KENNETH D. TYSON, II	)	
Claimant	)	
V.	)	
	)	
MILES EXCAVATING, INC.	)	Docket No. 1,076,417
Respondent	)	
AND	)	
	)	
HARTFORD FIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and insurance carrier (respondent), through Patricia A. Wohlford, requests review of Administrative Law Judge Kenneth J. Hursh's March 31, 2016 preliminary hearing Order. C. Anderson Russell appeared for claimant.

The record on appeal is the same as that considered by the judge and consists of the transcript of the March 30, 2016 preliminary hearing and exhibit thereto and all pleadings contained in the administrative file.

ISSUE

On December 4, 2015, claimant sustained a corneal laceration when cutting concrete with a saw and a nail flipped up and struck his right eye. He was not using safety glasses. The judge awarded claimant benefits, but respondent argues K.S.A. 2014 Supp. 44-501(a)(1)(B-D) precludes compensation, while claimant requests the Order be affirmed.

The issue is whether claimant recklessly or willfully violated respondent's safety policy or failed to use a reasonable safety device provided by respondent.

FINDINGS OF FACT

Claimant, 31 years old, began working for respondent as a cement mason in April 2014. Shortly after being hired, claimant signed an "Employee Safety Rules Policy Certification," which stated, "Safety glasses will be worn when chipping, grinding, welding, cutting and/or handling cement . . . ."[1] Claimant also had extensive OSHA safety training. He admitted being well-versed in the importance of wearing personal protective equipment, including safety glasses (to avoid getting debris in his eyes), and indicated he was conscientious about wearing safety glasses. He testified respondent provided him with tinted or UV safety glasses, a hard hat and a safety vest, but not clear safety glasses.

[1] P.H. Trans., Resp. Ex. A at 1.

About two weeks before his accidental injury, claimant worked at respondent's job site in Leavenworth at night and only had tinted safety glasses available. Claimant could not see when wearing tinted glasses. Claimant spoke to his foreman about getting clear safety glasses, but was told "they didn't have any on the job site."[2] Therefore, claimant worked at the Leavenworth job site without wearing safety glasses. This was the first time claimant ever needed clear safety glasses. He testified nobody with respondent admonished him for not wearing safety glasses. Claimant testified he regularly saw workers not wearing safety glasses at nighttime.

On December 4, 2015, claimant worked for respondent in Pleasant Valley, Missouri. Around 7:15 a.m., claimant was outdoors and preparing to cut an expansion joint with a Skilsaw.® Claimant testified the joint needed to be cut first because they were preparing to pour concrete. He was wearing tinted safety glasses and could not see where he was cutting while wearing the darker glasses. He removed his safety glasses so he could cut the joint because it was "still gloomy and dark outside, no sunlight."[3] There was no artificial lighting. Claimant did not ask respondent that day about the availability of clear safety glasses. When cutting the joint, a nail dislodged from the concrete and lacerated his right cornea. According to claimant, he had a coworker pull the nail out of his eye.

Claimant drove himself to a hospital and was transferred to KU Med, where he had surgery. Claimant did not return to work for respondent, but works for another employer.

Claimant admitted respondent had safety glasses available at the job sites, but testified his dealings were always limited to needing tinted safety glasses only. Claimant admitted he was in violation of respondent's safety policy by not wearing any safety glasses. He testified he chose to operate his saw without safety glasses because he could not see with the dark glasses. Claimant testified he did not refuse to work unless he was given clear safety glasses because his supervisor told him to get the job done.

Claimant testified he saw Dave Redlin, respondent's environmental health and safety director, inspect job sites relative to safety rules two times in two years. Claimant never observed Mr. Redlin admonish any employees about not wearing safety glasses.

Jane Breuer, respondent's director of operations, testified new employees attend safety meetings which highlight OSHA regulations and the importance of safety equipment. Ms. Breuer testified that respondent has an amazing safety record and has not had an OSHA violation in eight years. She indicated employees also participate in tool box talks which a supervisor periodically conducts at job sites to cover many things, including safety. Claimant denied having tool box talks in which safety was discussed.

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[2] *Id*. at 8.

[3] *Id*. at 7.

Ms. Breuer indicated respondent's office has cabinets and drawers containing safety equipment, including both clear and tinted safety glasses. Supervisors gather up the needed safety equipment before going to a job site. She testified supervisors frequently carry extra safety glasses in their truck and/or they are located in job site trailers so employees can replace them as needed. Ms. Breuer was uncertain if any clear safety glasses were available at claimant's job site on December 4, 2015. She acknowledged claimant was never cited for any other safety violations. Ms. Breuer has seen reports from Mr. Redlin indicating an employee was not wearing safety glasses. She indicated employees who commit safety violations are given warnings, but can be terminated after one or two violations, with three violations typically leading to job termination.

Mr. Redlin, who is also an OSHA outreach trainer, testified respondent has both clear and tinted safety glasses and makes them available at their job sites. He saw both clear and tinted safety glasses at the Leavenworth job site when he went there. He admitted he did not know with certainty if clear safety glasses were available at the job site on December 4, 2015. Mr. Redlin testified every worker has a hard hat decal with his phone number on it that they are supposed to call if they need anything, including safety equipment, but he has never received a call.

Mr. Redlin testified he performs random audits of job sites. If he comes across a worker not wearing safety glasses, he gives them a verbal warning and takes a picture of the violator for his report. If a worker commits a second violation, he issues a written warning and maybe gives the worker one-half day off without pay. Mr. Redlin testified that if he sees a worker cutting without safety glasses he would wait until after the cut to tell them to use safety glasses because interrupting the cut could cause greater risk of injury. He indicated respondent does not have a major problem with employees not wearing safety glasses. Mr. Redlin did not recall claimant ever being admonished before for not wearing safety glasses.

Claimant continues to have problems related to his accident including light sensitivity, irritation, blurred vision and occasional headaches.

The judge's order states:

> The record at this hearing didn't show the claimant's failure to wear safety glasses was a legal violation, so the respondent's defense rests on the latter two categories. The term "willful" in the statute implies an element of recklessness in the employee's failure to use the safety device, such as failure to heed prior warnings, or failing to use protection when potential injury is obvious and likely.
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> The claimant was not cited for safety violations in his two years with the company. On the morning of the accident, he removed his glasses for an understandable reason. They were tinted, and he couldn't see well enough to do his job at that time of day. Clear glasses may have been available at the jobsite, but the Leavenworth

supervisor's statement about clear glasses not being available could have led the claimant to think the company simply didn't have them. A nail kicking up from an expansion joint did not appear to be a likely occurrence, and wearing tinted glasses in morning twilight did not seem a reasonable way to operate a masonry saw safely.

The record failed to prove the claimant willfully violated company safety policy or willfully failed to use a reasonable safety device provided by the employer. The K.S.A 44-501(a)(1) safety device defense does not apply.[4]

Respondent appealed.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-501b(b) states an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment. K.S.A. 2014 Supp. 44-501b(c) states the burden of proof is on the claimant to establish his or her right to an award of compensation and the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-501 states:

(a) (1) Compensation for an injury shall be disallowed if such injury to the employee results from:

(A) The employee's deliberate intention to cause such injury;

(B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;

(C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;

(D) the employee's reckless violation of their employer's workplace safety rules or regulations; or

. . .

(2) Subparagraphs (B) and (C) of paragraph (1) of subsection (a) shall not apply when it was reasonable under the totality of the circumstances to not use such equipment, or if the employer approved the work engaged in at the time of an accident or injury to be performed without such equipment.

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[4] ALJ Order at 3.

To deny benefits for failing to use a proper guard or protection voluntarily provided by the employer for the employee's use, such failure must be "willful." *Carter* states:

> [T]he meaning of the word "willful," as used in the statute includes the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . "Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse." (Webster's New International Dictionary.)[5]

"Willfulness" entails a higher standard of culpability than "recklessness."[6] "[R]ecklessness contemplates something beyond ordinary negligence. To conclude claimant acted with the requisite recklessness, the preponderance of the credible evidence must support a conscious disregard of a known risk that exceeds negligence. Recklessness is akin to gross, culpable or wanton negligence."[7] Recklessness is a lesser standard of conduct than intentional conduct and requires running a risk substantially greater than the risk which makes the conduct merely negligent or careless.[8]

"[T]he term recklessness is not self-defining," but the common law has generally understood it in the sphere of civil liability as action entailing "an unjustifiably high risk of harm that is either known or so obvious that it should be known."[9]

In *Wiehe*,[10] the Kansas Supreme Court quoted Restatement (Second) of Torts § 500(a) (1965), pp. 587-588:

> Types of reckless conduct. Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to

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[5] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 85, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987) (quoting *Bersch v. Morris & Co.*, 106 Kan. 800, 804, 189 P. 934 (1920)). The Board has questioned if this definition of "willful" ascribes common meaning to common words. See *Grant v. Firstamerica*, No. 1,070,110, 2016 WL 858319 (Kan. WCAB Feb. 4, 2016) and *Baldwin, Jr. v. Professional Lawn Care Services*, No. 1,024,450, 2013 WL 2455683 (Kan. WCAB May 7, 2013).

[6] *Hardiman v. Kellogg Snack Division*, No. 1,062,612, 2013 WL 3368494 (Kan. WCAB June 10, 2013).

[7] *Id.*

[8] *Robbins v. City of Wichita*, 285 Kan. 455, 470, 172 P.3d 1187 (2007) citing Restatement [Second] of Torts § 500, p. 587 [1963-1964].

[9] *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 68, 127 S. Ct. 2201, 167 L.Ed.2d 1045 (2007) (citing *Farmer v. Brennan*, 511 U.S. 825, 836, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

[10] *Wiehe v. Kukal,* 225 Kan. 478, 483-84, 592 P.2d 860 (1979).

> know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.
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> For either type of reckless conduct, the actor must know, or have reason to know, the facts which create the risk.
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> . . .
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> For either type of conduct, to be reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.

K.S.A. 2014 Supp. 21-5202(j) states in part:

> A person acts "recklessly" or is "reckless," when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

"Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."[11]

ANALYSIS

It was dark at 7:15 a.m. on December 4, 2015, and difficult for claimant to see when wearing his tinted safety glasses. Claimant's testimony regarding the lighting condition and his diminished vision when wearing the provided tinted safety glasses is not contradicted.

K.S.A. 2014 Supp. 44-501(a)(1)(B) does not bar compensation. Respondent puts forth no proof claimant willfully failed to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee.

Claimant's conduct does not reach the "willful" standard enunciated in *Bersch* and *Carter*. He was not acting by the rule of contradiction, being intractable or failing to yield to reason. He was not being obstinate, perverse or stubborn in disregarding a safety rule. 2014 Supp. 44-501(a)(1)(C) does not bar compensation.

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[11] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976).

The judge indicated "wearing tinted glasses in morning twilight did not seem a reasonable way to operate a masonry saw safely." K.S.A. 2014 Supp. 44-501(a)(1)(B) and (C) does not apply when it was reasonable under the totality of the circumstances to not use safety equipment. Impliedly, the judge found it reasonable for claimant to remove his safety glasses under the totality of the circumstances. This Board Member agrees with the judge's analysis.

This leaves 2014 Supp. 44-501(a)(1)(D) as a potential defense. Did claimant commit a reckless violation of his employer's workplace safety rules or regulations? Claimant intentionally removing his safety glasses to see where and what he was cutting was against respondent's rules. Claimant's action also may have been arguably negligent and careless. However, given the circumstances, his removal of dark safety glasses to see what he was cutting was not unreasonable or in excess of ordinary negligence.

Perhaps claimant should have asked for clear safety glasses before proceeding to make the cut that caused his injury. By the same token, perhaps respondent's employees should actually be provided and possess both types of glasses at all times, without the need to ask for the pair that works best.

Respondent cites *Lira*[12] as showing that failure to wear safety glasses is reckless. In such case, Lira was supposed to be wearing safety glasses when he was injured. He testified he was not wearing safety glasses because they had been stolen the prior work day at lunch and he had no opportunity to replace the glasses. Lira testified other employees had been allowed to work without safety glasses, contrary to the testimony of a witness put forth by his employer. The judge found Lira's not wearing safety glasses was reckless. A single Board Member agreed, noting the judge apparently found Lira's excuses and testimony lacking, in addition to concluding replacement safety glasses were available.

Lira does not control the outcome of this case. Each case is determined based on the facts specific to the case. A preliminary decision from one Board Member does not necessarily dictate the outcome of another Board Member's ruling. Lira was found not credible by the single Board Member. The same is not true for claimant in this case. Additionally, the judge seemed to believe claimant's testimony that he was told two weeks earlier at the Leavenworth job site that clear safety glasses were not available, which could have led claimant to suspect such glasses were not available at the Pleasant Valley job site. Such testimony was not present in *Lira*.

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[12] *Lira, Jr. v. Preferred Personnel, Inc.*, No. 1,067,794, 2014 WL 1758045 (Kan. WCAB Apr. 10, 2014).

CONCLUSIONS

K.S.A. 2014 Supp. 44-501(a)(1) does not disallow compensation. Claimant did not: willfully fail to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee; willfully fail to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer; or recklessly violate respondent's workplace safety rules or regulations.

WHEREFORE, this Board Member affirms the March 31, 2016 Order.[13]

IT IS SO ORDERED.

Dated this _____ day of May, 2016.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Kenneth J. Hursh

[13] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.